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IN THE

# SUPREME COURT

OF THE
UNITED STATES

## OCTOBER TERM, 1982

THE STATE OF ARIZONA, ET AL.,

*Petitioners,*

v.

SAN CARLOS APACHE TRIBE OF ARIZONA AND THE NAVAJO TRIBE OF INDIANS, ET AL.,

*Respondents.*

## BRIEF AMICUS CURIAE OF THE STATE OF WASHINGTON IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## BRIEF AMICUS CURIAE OF THE STATE OF WASHINGTON IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The State of Washington, through its Attorney General, files this Amicus Curiae brief in accordance with Rule 36 of this Court.

## I. STATEMENT OF INTEREST OF AMICUS CURIAE

Long-standing federal water resource policy has recognized the primacy of state law for the establishment, adjudication, and regulation of water rights in the western states. *United States v. New Mexico*, 438 U.S. 696 (1978); *California v. United States*, 438 U.S. 645 (1978). Consistent therewith, those states have adopted

comprehensive, unitary "water codes" that cover all phases of water rights administration. II Hutchins, *Water Rights Laws in the Nineteen Western States*, chapter 15 (1974).

Washington State's water code was enacted in 1917. See generally Chapter 90.03 RCW. One of the code's basic elements, a "general adjudication" system, sets forth a court process for determining the validity of all claims to water rights on a correlated basis for an entire stream system. RCW 90.03.110-245. See *Dugan v. Rank*, 372 U.S. 609 (1963). Washington's general adjudication statute expressly relates to all water right claims of the United States. RCW 90.03.245.[1] See 43 U.S.C.A. § 666; *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976).[2]

The State of Washington's interest in this case, as a "disclaimer" state,[3] relates to the cloud placed (erroneously, we submit) over the state's ability to effectively and efficiently administer the general

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[1]RCW 90.03.245 provides, in pertinent part:

> Rights subject to determination proceedings conducted under RCW 90.03.110 through 90.03.240 and 90.44.220 include all rights to the use of water, including all diversionary and instream water rights, and include rights to the use of water claimed by the United States.

[2]43 U.S.C.A. § 666 is a consent by Congress to the joinder of the United States in general adjudication proceedings. Under that section, claims of the United States for Indian reserved rights are subject to determination in state court general adjudication proceedings. *Colorado River Water Conservation District, supra.*

[3]A "disclaimer" state, as used herein, is a state which has a provision in the federal "enabling" act admitting it to statehood or in its own constitution that provides substantially as follows:

> That the people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries of this state, and to all lands lying within said limits owned or held by any Indian or Indian tribes: and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States.

The quoted provision is a portion of Washington's Constitution, Article XXVI. At least eight other western states have the same or similar provisions — Montana, Arizona, Wyoming, New Mexico, Utah, Idaho, North Dakota and South Dakota.

adjudication provisions of its water code by the Court of Appeals in *Northern Cheyenne Tribe v. Adsit*, 668 F.2d 1080 (9th Cir., February 22, 1982) and *San Carlos Apache Tribe v. Arizona*, 668 F.2d 1093 (9th Cir., February 23, 1982).[4] Washington's concern is more than theoretical. As we shall describe shortly, those decisions imperil an active and beneficial program of general adjudications processing begun by the State of Washington more than twenty years ago and now being pursued vigorously in its court system.

## II. ARGUMENT

### A. Background — A Long History of United States Recognition of State Court Jurisdiction In A Disclaimer State.

Over the past two decades, the State of Washington has initiated twenty general adjudication proceedings in its courts.[5] Pursuant to 43 U.S.C.A. § 666, the United States has been joined as a defendant (i.e., water right claimant) in sixteen of these proceedings. Of special note, beginning in 1962 the United States has filed claims of *water rights for Indians or Indian tribes* based on the federal reserved rights doctrine in four of these state court proceedings; namely:

(1) *In re Chiliwist Creek*, Okanogan County No. 16323 (filed January 16, 1961, final decree entered May 16, 1967).

(2) *In re Bonaparte Creek*, Okanogan County No. 17787 (filed December 27, 1968, final decree entered December 14, 1979).

(3) *In re Antoine Creek*, Chelan County No. 34113 (filed March 31, 1980, now being processed).

(4) *In re Yakima River*, Yakima County No. 77-2-01484-5 (filed October 12, 1977; now being processed).

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[4]That cloud is, of course, that, notwithstanding 43 U.S.C.A. § 666, disclaimer clauses preclude state courts from determining the validity of United States claims of Indian reserved rights in general adjudication proceedings.

[5]Since the enactment of the state's water code in 1917, eighty-five general adjudication proceedings have been initiated in Washington's courts. During the depression of the 1930's and World War II, no general adjudications were initiated. The program was reactivated by the State of Washington in the early 1960's.

In both *In re Chiliwist Creek* and *In re Bonaparte Creek, supra,* the United States' claims for Indian water rights were confirmed by the state courts as the senior (or highest) priority rights on the stream. Importantly, the United States participated fully in these state proceedings throughout the 1960's and 1970's. At no time during these proceedings was any hint or suggestion given by the United States that the State of Washington's court system was barred from adjudicating Indian reserved water right claims by either the "disclaimer" provisions of Washington's Constitution or the federal statehood (or "enabling") act.

Then, however, on October 23, 1981, without prior notice, warning or explanation, the United States dramatically altered its long-standing position recognizing the jurisdiction of the state courts by filing a motion in *In re Yakima River, supra,* challenging that jurisdiction based on disclaimer provisions. This surprising action was taken *four years after* the general adjudication was filed in Yakima County Superior Court and *two years after* the case had been remanded to state court by order of the United States District Court for the Eastern District of Washington.[6] The Yakima County Superior Court denied the United States' motion to dismiss on "disclaimer" grounds on February 16, 1982[7] (one week *prior* to the issuance of the Ninth Circuit's decisions in *Adsit* and *San Carlos Apache*) and on April 12, 1982 reaffirmed that denial (in response to a United States' motion for reconsideration based on the two Ninth Circuit decisions).[8]

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[6]The United States' belated motion to dismiss was filed after the plaintiff-state had already accomplished personal service on more than six-thousand defendants and service by publication. In addition, approximately two-thousand defendants had filed statements of claim of water rights. At the time of filing of the motion by the United States, the State of Washington alone had spent an estimated $300,000 in the then four-year-old litigation. We have no estimates of the United States' expenditures, not to mention the very considerable amounts expended by the numerous other public and private defendants.

[7]The Superior Court's views were contained in a nineteen page "memorandum decision" of Judge Walter A. Stauffacher analyzing all aspects of the United States' contentions.

[8]Under Washington law, state courts are not bound by decisions of the federal court system except for those of this court. *Beezer v.*

Thus, the harmonious relationships in general adjudication litigation between the United States and the State of Washington on the disclaimer issue, extending over two decades, had been extinguished by the United States. Most interestingly, the United States' change in position was taken *without any newly announced* congressional policy, or precedent of this or any other court, to rely upon. Indeed, as we note next, all court precedents on the subject supported the two decades of harmony enjoyed in Washington State.

### B. The Ninth Circuit's Decision Was Wrongly Decided and Should be Reversed.

#### 1. Wrongly Decided — The Decision Conflicts Directly with Decisions of this Court.

Over the past six years the disclaimer issue has been ruled upon by the following courts, among others: (1) Tenth Circuit Court of Appeals, *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116 (10th Cir.) cert. denied, 444 U.S. 945 (1979); (2) the New Mexico Supreme Court, *State ex rel Reynolds v. Lewis*, 88 N.M. 636, 545 P.2d 1014 (1976); (3) two Washington State Superior Courts, *In re Yakima River, supra*, and *In re Antoine Creek, supra;* and (4) the Ninth Circuit Court of Appeals in *Adsit, supra*, and *San Carlos Apache, supra*. The unanimous conclusion of the judges of these courts, with the exception of the majority of the three-judge panels of the Ninth Circuit, is that "disclaimer" provisions do *not* preclude state court general adjudication jurisdiction.[9]

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*Seattle*, 62 Wn.2d 569, 593, 383 P.2d 895 (1963). The Yakima County Superior Court declined to follow the Ninth Circuit's disclaimer decisions in *Adsit* and *San Carlos Apache* on the grounds the analyses supporting these decisions were unsound. By order entered May 17, 1982, the Chelan County Superior Court (Judge Charles W. Cone), in *In re Antoine Creek, supra*, followed the ruling of the Yakima County Superior Court in *In re Yakima River*.

[9]The Ninth Circuit Court's majority also concluded erroneously that Public Law 83-280, as amended, was relevant to the resolution of the disclaimer provision as it pertains to Indian water rights. For an unexplainable reason, the Ninth Circuit completely misinterpreted the pertinent teaching of *Colorado River Water Conservation District, supra*, at 812-813 (footnote 20) that:

The overwhelming support for that conclusion is easily explained. It is firmly founded upon *decisions of this court* as to the meaning of the two portions of the disclaimer clause at issue, namely, a state's agreeing (1) to "disclaim all right and title" to all lands within a state held or owned by an Indian or Indian tribes, and (2) that, until such Indian titles are extinguished, such lands remain "under the absolute jurisdiction and control" of Congress.

As to the "disclaimer of title" portion, this Court has made it unmistakeably clear that it relates only to a state's *proprietary* interest in Indian lands, and that no relinquishment of governmental power was involved. *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962). See also *Draper v. United States*, 164 U.S. 240 (1896). With regard to a disclaimer clause's "absolute jurisdiction" provision, *Kake* stated expressly that "absolute jurisdiction is not invariably exclusive jurisdiction." *Id.* at 68. In other words, it is Congress' determination whether a state may apply its laws to Indian interests.

Accordingly, disclaimer provisions provide no insurmountable barrier to state court jurisdiction in general adjudication proceedings. When the teachings of this Court in *Kake* are coupled with Congress' consent to join the United States in state court general adjudication proceedings by 43 U.S.C.A. § 666, one proposition is clear. State courts are not barred by disclaimer provisions from

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To be sure, 25 U.S.C. § 1322(b) and 28 U.S.C. § 1360(b) provide that nothing in those sections "shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of [any real or personal property, including water rights, belonging to any Indian or any Indian tribe * * * that is held in trust by the United States]." This provision in both sections, however, *only qualifies the import of the general consent to state jurisdiction given by those sections. It does not purport to limit the special consent to jurisdiction given by the McCarran Amendment.* A contrary conclusion is foreclosed by the principle of construction that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton v. Mancari*, 417 U.S. 535, 550-551 (1974).

Further, Public Law 83-280, by its own terms, excludes water rights from its coverage. 25 U.S.C.A. § 1322. Thus, it was an error for the Ninth Circuit to take into account Public Law 83-280 in relation to any disclaimer clause issue *pertaining to water rights.*

conducting general adjudications involving United States' claims to reserved water rights for Indians. See *Colorado River Water Conservation District, supra.*

2. Practical Reasons for Granting the Petition — The Court of Appeals Decisions Unnecessarily and Detrimentally Disrupt the Administration of Sound Water Right Laws of Disclaimer States.

The Ninth Circuit's decisions have a wide range of undesirable impacts.

First, the uncertainties they place upon efforts of states, like Washington, to conduct general adjudications — efforts that are encouraged by federal congressional policy — are completely unsatisfactory. For example, motions to dismiss, which would not otherwise be presented, are their direct product. Thus, not only do these decisions promote the inefficient use of judicial resources but they expend unnecessarily both public and private financial resources, and cause delay in processing when delay is particularly undesirable.[10]

Second, the Ninth Circuit opinions emasculate the federal policy of encouraging the use of western states' specially designed procedures for the general adjudication of water rights. *Colorado River Water Conservation District, supra,* 819.[11] The necessary result of the Ninth Circuit's decision is to shift the burden for the conduct of general adjudications to the federal court system. This

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[10]For example, in *In re Yakima River* at least two months delay in processing was occasioned by a United States motion for reconsideration based on *Adsit* and *San Carlos Apache.* Further delay has been brought about by *Adsit* arising from a request for discretionary review, filed on May 12, 1982 with Washington's Court of Appeals, requesting examination of the Yakima County Superior Court's refusal to follow *Adsit* and *San Carlos Apache.*

[11]This Court described McCarran Amendment (43 U.S.C.A. § 666) policies in *Colorado River Water Conservation District*:

"* * * The clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system. * * * Indeed we have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings. * * * The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive

system, we note, has no special general adjudication process and, at least in Washington State, is already overburdened.[12]

Finally, if such a shift to federal courts does take place, it is almost certain that substantially fewer general adjudications will take place in Washington State. This is so because, for no other reason, the motivation of a state to pursue an active general adjudication program (being one outside its specially tailored statutory process) will be reduced. The offspring of this condition is that, in the future, states will make both poorer water rights planning and permit-issuing decisions, not to mention poorer decisions on the regulation of the exercise of existing water rights. This being so, there will undoubtedly be an increase in piecemeal disputes between individual water users. Federal policy frowns upon piecemeal litigation to resolve water right disputes. Clearly such litigation, which would not have taken place if an active, soundly administered state general adjudication and associated regulation program was in place, will surely follow.

## III. SUMMARY OF ARGUMENT

The cloud of uncertainty which the Ninth Circuit decisions have placed over general water rights adjudication programs of Washington, and the several similarly situated disclaimer states in the west, should be removed.

Because of the clarity of the law on the disclaimer issue as announced previously by this Court, and the clearly erroneous application thereof by the Ninth Circuit, we further urge this Court to grant the petition and reverse the lower court's decision on that issue by summary disposition, without further briefing or argument, through

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state systems for adjudication of water rights as *the* means for achieving these goals." (Emphasis supplied.)

424 U.S. at 819.

[12]In the two instances where federal courts in Washington State have conducted adjudication of water rights proceedings, very serious difficulties in processing them to completion have been experienced. *United States v. Anderson*, Civil No. 3643 (D.C., E.D. Wash.) and *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), cert. denied, ___ U.S. ___, 70 L.Ed.2d 630, 102 S. Ct. 657 (1981).

issuance of a per curiam opinion. See, e.g., *City of Seattle v. Beezer*, 376 U.S. 224 (1964).[13] That approach is commended to this Court based on its decisions in *Kake* and *Colorado River Water Conservation District, supra.* Those two cases, when taken together, support unequivocally the proposition that the Congress, in the exercise of its "absolute jurisdiction and control" over Indian property interests, may permit courts of a disclaimer state to exercise jurisdiction over such interests *without modification* of the wording of either a state or federal disclaimer clause. They further support the proposition that, by the passage of the McCarran Amendment, 43 U.S.C.A. § 666, the Congress has thus authorized Indian reserved water rights to be determined in state court general adjudication proceedings.

## CONCLUSION

The State of Washington urges the granting of the petition for writ of certiorari. In relation to disclaimer issues, we urge the Court to resolve the writ so issued in summary fashion.

Dated: July 9, 1982.

Respectfully submitted,

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[13]It is recognized that the expeditious resolution suggested herein may well only resolve *San Carlos Apache* in its entirety as it appears to relate solely to the disclaimer issue. (*Adsit* raises broader issues involving situations where federal courts and state courts have competing "general adjudications" pending. In this context, if the petitions for writ of certiorari are granted in both *San Carlos Apache* and *Adsit*, we urge that briefs and oral arguments be provided in *Adsit* only as to the non-disclaimer issues.)